No. 79-2069

Supreme Court, U.S.
FILED
JUN 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SANDRA BULGIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEROME A. DePALMA
SCOTT B. ZOLKE
33 North LaSalle Street
Suite 3800
Chicago, Illinois 60602
(312) 236-0360

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT	5
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	9
APPENDIX A—Opinion of the Court of Appeals	1a
APPENDIX B—Judgment of the Court of Appeals	14a
APPENDIX C—Memorandum Opinions of the District Court	15a
APPENDIX D—Order of the Court of Appeals	27a
APPENDIX E—Order of the Court of Appeals	28a

TABLE OF AUTHORITIES

Cases

DiBella v. United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962) 6, 7

United States v. Dieter, 429 U.S. 6, 97 S.Ct. 18, 50 L. Ed.2d 8 (1976) 6

United States v. Humphries, 600 F.2d 1238 (9th Cir. 1979) 7

United States v. Robinson, 316 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960) 7, 8

United States v. Scott, 524 F.2d 465 (5th Cir. 1975) 6

United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d ..... (1975) 8

Other Authorities

18 U.S.C. Section 3731 ..... 4, 6, 7, 8, 9

28 U.S.C. 1254(1) 2

Rule 4(b), Federal Rules 3, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SANDRA BULGIER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SANDRA BULGIER, by and through her attorneys, Jerome A. DePalma, and Scott B. Zolke, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, (App. A, *infra*, pp. 1a-13a), is not yet reported. The memorandum opinion and supplemental memorandum opinion of the district court, (App. C, *infra*, pp. 15a-26a), are unreported.

JURISDICTION

The judgment of the Court of Appeals, (App. B, *infra*, p. 14a), was entered on April 8, 1980. The order of the Court of Appeals, (App. D, *infra*, p. 27a), denying the Petition for Rehearing was entered on April 29, 1980. The order of the Court of Appeals, (App. E, *infra*, p. 28a), denying the Petition for Rehearing in Banc was entered on May 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the filing of a Motion for Reconsideration directed to an order suppressing evidence tolls the time for filing Notice of Appeal, or whether the denial of a Motion for Reconsideration is itself an appealable order under Section 3731 of Title 18, United States Code.

STATUTORY PROVISIONS INVOLVED

Rule 4(b), Federal Rules of Appellate Procedure provides:

> In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Section 3731, Title 18, United States Code, provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall be to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with Chapter 207 of this Title.
>
> The provisions of this Section shall be liberally construed to effectuate its purposes.

STATEMENT

1. On July 24, 1979, the District Court granted the petitioner's Motion to Suppress the Evidence, supported by a memorandum opinion. (App. C, *infra*, pp. 15a-18a).

2. On August 9, 1979, the government filed its Motion for Reconsideration which was denied on September 5, 1979, again supported by a memorandum opinion. (App. C, *infra*, pp. 19a-26a).

3. On September 10, 1979, the government, pursuant to Section 3731, Title 18, United States Code, filed its Notice of Appeal. (App. A, *infra*, p. 4a).

4. On October 4, 1979, the petitioner filed her Motion to Dismiss the Appeal as filed more than thirty days from the order of July 24, 1979, suppressing the evidence.

REASONS FOR GRANTING THE PETITION

1. The government's motion for reconsideration is neither provided for in the Federal Rules of Appellate Procedure, nor in Section 3731 of Title 18, United States Code. Yet, the court of appeals held that a motion for reconsideration terminates the running of the time for appeal. In so doing, the court of appeals misconceived this Court's decision in *United States v. Dieter*, 429 U.S. 6, 97 S.Ct. 18, 50 L.Ed.2d 8 (1976), which held that a motion to set aside the dismissal of an indictment tolls the time for appeal. The *Dieter* case leaves unresolved the questions of whether the denial of a motion for reconsideration is itself an appealable order under Section 3731, or whether a motion for reconsideration extends the time for appealing from a Section 3731 order.

This Court has made it very clear that only Congress can enlarge the government's right to appeal in criminal cases. *DiBella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962). Hence, a court of appeals is without power to determine which types of judgments and orders are appealable. In addition, a reviewing tribunal is under a duty to make certain of its jurisdiction and must decline to proceed in a cause where jurisdiction is lacking.

2. Motions for reconsideration have met with varying interpretations throughout the circuits. *United States v. Scott*, 524 F.2d 465 (5th Cir. 1975), holds that the government's statutory right to appeal from an order suppressing evidence is not an exclusive remedy, and that it was within the discretion of the district court to grant a motion for reconsideration of an order suppressing evidence. The Ninth Circuit has held that although

appeals after the statutory thirty day limitation period are not regarded with favor, the court may exercise jurisdiction. *United States v. Humphries*, 600 F.2d 1238 (9th Cir. 1979). The Ninth Circuit has further reasoned in *Meier v. Keller*, 521 F.2d 548, 553 (9th Cir. 1975), *cert. denied*, 423 U.S. 943, 96 S.Ct. 1410, 47 L.Ed.2d 348 (1976), that the thirty day limitation on appeals as provided in 18 U.S.C. 3731 is not jurisdictional. The *Keller* decision is in direct conflict with this Court's long standing rule that the taking of an appeal within the time prescribed by Fed.R.App.P. 4(b), is both mandatory and jurisdictional. *United States v. Robinson*, 316 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960). This conflict in interpretations of Rule 4(b) and Section 3731 has presented an area of great confusion.

3. Inasmuch as Congress alone is empowered to grant the government statutory authority to take an appeal in a criminal case, a court of appeals or a district court cannot enlarge or modify that right. The instant case presents a most crucial area of concern because the order from which the government took its appeal was interlocutory. This Court has consistently recognized that "the concept of finality as a condition of review has encountered situations which made clear that it need not invite self-defeating judicial construction." *DiBella*, 369 U.S. 121, 125 (1962). It is not the province of a lower federal court to determine the boundaries of its jurisdiction, but rather to work within those boundaries and determine whether it has the requisite statutory authority to exercise its jurisdiction. To permit a lower court to classify certain types of interlocutory orders as appealable is to invite inconsistency, confusion and delay in the administration of the judicial process.

Jurisdiction is not a matter of discretion. However, the lower courts have exhibited many divergent degrees of judicial construction resulting in a departure from the long standing rule "that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Robinson*, 361 U.S. 220, 229 (1960). For a court of appeals to ignore the thirty day time limitation and recognize a late notice of appeal is to actually enlarge its jurisdiction. The result of such a practice is to circumvent the proper administration of the Rules of Court. By adopting the view that a motion for reconsideration of an interlocutory order is the same as a motion for rehearing directed at a final judgment, the Seventh Circuit has promulgated a quasi rule of appellate procedure which is inconsistent with the requirement of finality.

4. Simply stated, Rule 4(b) and Section 3731 must specifically provide for a motion for reconsideration. There would consequently be no confusion nor inconsistent interpretations of the proper time in which to file a notice of appeal. The lower federal courts would not be left with the task of determining the limitations for filing. What now plagues the courts is an uncertainty which can only be remedied by the prescription of precise times within which the power of the courts must be confined.

5. There is no reason for continuing to require the lower federal courts to construe 18 U.S.C. 3731 in an arbitrary manner. Congress intended to remove all statutory barriers to government appeals, but enacted no statute or rule which permits the government to extend the time for appeal by filing a post-order motion. As this Court reasoned in *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d (1975), the government must have express statutory authority in order to

take a criminal appeal. It follows that the statutory authority which specifically provides express time limitations in the exercise of that right, cannot be expanded by differing interpretations in the lower federal courts.

Given the nature of the government's right to appeal from an order suppressing evidence, in light of the general principle of federal appellate jurisdiction requiring finality for review, this Court must determine whether 18 U.S.C. 3731 empowers a court of appeals with jurisdiction to entertain an appeal from the denial of a motion for reconsideration directed at a non-final suppression order. The disagreement among the circuits and confusion within, demand an adjudication of such conflicting and confused views regarding a problem of considerable importance in the proper administration of appellate practice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME A. DePALMA
SCOTT B. ZOLKE
33 North LaSalle Street
Suite 3800
Chicago, Illinois 60602
(312) 236-0360

Counsel for Petitioner

June, 1980

APPENDICES

	Page
APPENDIX A — Opinion of the Court of Appeals	1a
APPENDIX B — Judgment of the Court of Appeals	14a
APPENDIX C — Memorandum Opinions of the District Court	15a
APPENDIX D — Order of the Court of Appeals	27a
APPENDIX E — Order of the Court of Appeals	28a

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

No. 79-2053

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SANDRA BULGIER,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 CR 185—**Joel M. Flaum**, *Judge.*

ARGUED FEBRUARY 21, 1980—DECIDED APRIL 8, 1980

Before SPRECHER, TONE and WOOD, *Circuit Judges.*

SPRECHER, *Circuit Judge.* In this appeal we uphold the validity of a warrantless search and seizure accomplished through a controlled delivery of narcotics.

I

The facts are recited substantially as found by the district court. On March 16, 1979, defendant arrived at O'Hare International Airport in Chicago on a Continental Airlines flight from Los Angeles, California. She was unable to locate her luggage, and so she filed a Delayed Baggage Report with Continental. Thereupon, defendant left the airport.

The next day, Continental employees located the missing luggage, consisting of two suitcases and a golf bag. After an unsuccessful attempt to have the luggage delivered to the address listed in the report, followed by an equally abortive effort to contact defendant at the telephone number set forth therein,[1] the employees opened the smaller suitcase in the hope of finding some further means of contacting the defendant. In so doing, they were following what seems to have been Continental's normal operating procedure in such cases.[2]

In the course of searching the bag for identification, the Continental employees found 90.83 grams of cocaine inside several clear plastic bags contained in a manila envelope. When Continental's baggage service agent, Shava Judy Spector, arrived at work on March 18, she was informed that the bag had been searched and that drugs were found in it. She then examined the plastic bags herself and, believing them to contain heroin, she called the Drug Enforcement Administration (DEA).

In response to her call, Special Agent Thomas L. Thompson contacted her. When apprised of the facts, Thompson went to meet Spector at the airport.[3] Spector showed him the open suitcase, with the manila envelope lying on top. Thompson removed the plastic bags therefrom and, upon visual inspection, concluded that they contained cocaine. Beyond noticing the fact that the open suitcase also contained some type of clothing, Thompson had no personal knowledge of what else was

---

[1] The delivery man could not deliver the bags because no one was home at the address and the neighbors refused to accept the bags because they said there had been a drug raid at the listed address. Tr. 130. The telephone listed in the report had been disconnected. Tr. 134.

[2] The government, without objection by the defendant, advised us that the airline employees were following Civil Aeronautics Board Regulation No. 142, Rule 340(A)(1) which provides in part: "All baggage is subject to inspection by the carrier . . . ."

[3] Before Thompson or any other DEA agent arrived, all three pieces of luggage had been examined by airline personnel. Tr. 121-22.

in the open suitcase. In Thompson's presence another search of the defendant's three pieces of luggage was conducted by airline personnel.

Subsequently, someone called Spector's office regarding defendant's luggage. When informed that it had been found, the caller stated that he would come and pick it up.

After listening, with Spector's consent, to that call, Thompson summoned Special Agent Michael Hillebrand to the scene. By the time Hillebrand arrived at Spector's office, the smaller suitcase had been closed, with the substance tentatively identified as cocaine inside. Hillebrand had no personal knowledge of what that suitcase contained. However, Thompson and Spector had told him what they knew about the situation.

A few hours later, the defendant and a male companion arrived and claimed the luggage. The defendant signed for it, and picked up the smaller suitcase. Her companion took the other two pieces of her baggage. They then took different escalators down to the lower level of the terminal. When the defendant exited from the lower level and headed towards her companion's automobile, Hillebrand placed her under arrest and seized the luggage.

From the time the defendant informed the Continental employee working at the ticket counter that she was there to pick up her baggage until the moment of her arrest, she was under Hillebrand's continual surveillance. He observed that she did not open the suitcase during that time period.

Immediately after placing the defendant under arrest, Hillebrand conducted a quick weapons search of her purse and found none. Based upon the nature of defendant's clothing, he was satisfied that no pat-down of her person would be necessary. He did not feel it necessary to search the smaller suitcase for weapons at that time, as he had seized it at the same instant that he arrested the defendant.

Having concluded that defendant was unarmed and not dangerous, Hillebrand took her to the airport DEA office. Once there, he opened the smaller suitcase and subjected it, along with her purse, to a thorough search. During this search, he found the cocaine and a "coke spoon" in the suitcase and another "coke spoon" in her purse. The cocaine was then subjected to a field test which yielded positive results.

The district court granted the defendant's motion to suppress the cocaine and the "coke spoon" taken from the suitcase. The government appealed.

II

At the outset we are confronted with a question of jurisdiction. On July 24, 1979, the district court granted the defendant's motion to suppress the evidence, supported by a memorandum opinion. On August 9, the government filed its motion for reconsideration. On September 5, the court denied the government's motion, again supported by a memorandum opinion. The government's notice of appeal was filed on September 10, 1979.

The defendant has filed in this court a motion to dismiss the appeal as filed more than thirty days from July 24. The government responded and we ordered that the motion be taken with the case.

The right of the government to appeal from an order suppressing evidence is provided by 18 U.S.C. § 3731.[4]

---

[4] 18 U.S.C. § 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after

(Footnote continued on following page)

Both that section and Fed. R. App. P. 4(b)[5] fix the time for appeal at thirty days after the entry of the order.

The Supreme Court, applying 18 U.S.C. § 3731 and its own Rule 11(2), which fixed the time for appeal in criminal cases appealable directly from the district court to the Supreme Court, has held that if the government moves for a rehearing within the time fixed for taking an appeal, the motion terminates the running of the time for appeal and the time begins to run anew from the date of the entry of the order disposing of the motion. *United States v. Healy*, 376 U.S. 75, 77-80 (1964). See also 9 Moore's Federal Practice, ¶ 204.17, at 991-92 (2d ed. 1975).

Some doubt as to whether the same principle would apply when the criminal case was appealed from the

---

[4] *continued*

the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

[5] Fed. R. App. P. 4(b) provides in part:

When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

district court to a court of appeals, subject to Fed. R. App. P. 4(b) instead of Supreme Court Rule 11(2), was dispelled in *United States v. Dieter*, 429 U.S. 6 (1976), when the Court said:

> The Court of Appeals misconceived the basis of our decision in *Healy*. We noted there that the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending. 376 U.S., at 78-79. To have held otherwise might have prolonged litigation and unnecessarily burdened this Court, since plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court of a petition for rehearing. *Id.*, at 80. The fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity promptly to correct their own alleged errors, and we must likewise be wary of imposing added and unnecessary burdens on the courts of appeal.

Id. at 8 [footnote omitted].

The defendant seems to have placed some significance on the fact that the granting of the motion to suppress is "interlocutory." She argues that an appeal from such an order should be expedited. While it is true that both *Healy* and *Dieter* involved orders dismissing an indictment, 18 U.S.C. § 3731 gives the government the right to appeal both from orders dismissing indictments and from orders suppressing evidence. Section 3731 provides, as to both appeals, that they "shall be diligently prosecuted." Nevertheless, the Supreme Court approved the possibility of lengthier appeals in favor of giving the district courts the first opportunity to correct their own alleged errors. In addition, many dismissals of indictments are the direct result of suppressions of evidence.[6] Finally, the *Dieter* result was anticipated in

---

[6] In *Dieter*, the "District Court . . . reconsidered the . . . motion to suppress, and . . . dismissed the indictment." 429 U.S. at 6-7.

United States v. St. Laurent, 521 F.2d 506, 511-12 (1st Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976), where the appeal, like this one, was from the granting of a motion to suppress evidence.

The notice of appeal by the government was timely filed.

III

The district court based its suppression of the evidence primarily upon *Arkansas v. Sanders*, 99 S.Ct. 2586 (1979) and *United States v. Berry*, 560 F.2d 861 (7th Cir. 1977), *vacated on other grounds*, 571 F.2d 2 (7th Cir.), *cert. denied*, 439 U.S. 840 (1978). The court concluded that the warrantless search of the luggage which occurred after the defendant's arrest violated the Fourth Amendment under the authority of those cases.[7] Except for the facts that *Sanders* involved luggage and *Berry* involved an attache case, the two cases bear little factual resemblance to the present case,[8] which involves luggage but also involves an earlier private search by non-governmental persons and a "controlled delivery" by the government to the defendant.

Even as "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971), we do not believe that the Supreme Court

---

[7] Inasmuch as the court found the post-arrest search unconstitutional, it assumed, without deciding, that the prior search made by airport personnel in the presence of a DEA agent was permissible and that the earlier search provided probable cause to believe that the smaller suitcase contained contraband.

[8] In addition, *Berry* was vacated when we determined that *United States v. Chadwick*, 433 U.S. 1 (1977) would not be applied retroactively in this circuit. Likewise, the searches involved here took place on March 16-18, 1979 and *Sanders* was decided on June 20, 1979, so that it would require retroactive application of *Sanders* in order to apply it here. However, for the purposes of this case, we assume that both *Chadwick* and *Sanders* apply.

in *Sanders*, in which it recognized that "the circumstances giving rise to suppression requests can vary almost infinitely," intended that the word "luggage" would automatically require suppression to the exclusion of all other prior teaching surrounding the application of the Fourth Amendment. *Sanders*, *supra*, 99 S.Ct. at 2589.

Controlled deliveries of contraband apparently serve a useful function in law enforcement. They most ordinarily occur when a carrier, usually an airline, unexpectedly discovers what seems to be contraband while inspecting luggage to learn the identity of its owner, or when the contraband falls out of a broken or damaged piece of luggage, or when the carrier exercises its inspection privilege because some suspicious circumstance has caused it concern that it may unwittingly be transporting contraband. Frequently, after such a discovery, law enforcement agents restore the contraband to its container, then close or reseal the container, and authorize the carrier to deliver the container to its owner. When the owner appears to take delivery he is arrested and the container with the contraband is seized and then searched a second time for the contraband known to be there.

In this case, about four hours elapsed between the time of the government agent's awareness of the contraband until the suitcase containing it was picked up by the defendant. As we said in *United States v. Issod*, 508 F.2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975):

> During the 22-hour period the boxes were under the federal agents' surveillance or control in Wisconsin before defendant and his companion arrived to take delivery, the agents could have obtained a warrant to search and seize the boxes. They could not, however, have obtained a warrant to arrest the person who would claim the boxes or to search the vehicle into which the boxes would be loaded, because they could not satisfy the Fourth Amendment's requirement of an affidavit "particularly describing the place to be searched, and the person . . . to be seized" until those persons

> arrived to pick up the boxes. See Lowrey v. United States, 161 F.2d 30, 33 (8th Cir. 1947), cert. denied, 331 U.S. 849, 67 S.Ct. 1737, 91 L.Ed. 1858 (1947).

Id. at 993.

The district court here assumed that the government agents could have seized the cocaine and the suitcase in which it was transported before it was returned to the defendant, but that the second seizure and search required a warrant to satisfy the Fourth Amendment.

Several other circuits have taken a different view of controlled deliveries. In *United States v. Ford*, 525 F.2d 1308 (10th Cir. 1975), the court said:

> Realistically, the contraband was seized by the officers in California before it was ever shipped to Oklahoma. See *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973). The California officers marked the package and placed a business card inside it. Upon receiving assurances of cooperation from Oklahoma City officers, they authorized its shipment. This action constituted the initial act of control and dominion over the contraband, for without government authorization the airline officials could not have shipped the contraband. This official dominion continued unbroken because close surveillance followed the seized contraband, insuring that it remained within official possession. Actual physical control was in fact reasserted by the Oklahoma City police when the arrest process was completed. These material facts are indistinguishable from *DeBerry*, supra, and we adopt the analysis of that case in concluding that the official seizure of the contraband occurred in San Francisco when the government asserted dominion over it. The seizure must be judged against the Fourth Amendment as of that time and place.
>
> Certainly, the seizure meets the Fourth Amendment requirement of probable cause, because the government agents involved knew that the substance was contraband before seizing it. But, the officers' failure to obtain a warrant to seize can be excused only if the circumstances at the time of the

> seizure were sufficiently exigent to make their course of action imperative. See *Coolidge*, supra. We believe that such circumstances existed here. The California officers had determined with certainty—and without violation of privacy—that the substance submitted for shipment was contraband. At that time, they could have ordered that the substance be detained until a magistrate could issue a warrant to seize it. The time delay required to obtain a warrant, however, might very well have warned the parties to the crime of the government's presence and prevented their apprehension. If the contraband had not been shipped immediately, the Oklahoma City addressee probably would have become suspicious and remained aloof, and the officers' investigation and arrest process would have proven unproductive. See also cases cited in *Issod*, supra, at 993. In these circumstances we think the California officers' actions in seizing the package were reasonable and necessary. No warrant to seize was required here.
>
> The search was private, and the ensuing warrantless seizure was made upon probable cause under exigent circumstances. Neither the search nor the seizure violated appellant's Fourth Amendment rights.

Id. at 1312-13.

In *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973), the court said:

> It may be argued that the New York seizure was separate and distinct from the California search, and because there was ample opportunity for the New York officers to obtain a warrant for the suitcases's seizure, its warrantless seizure violated the fourth amendment. *See* Coolidge v. New Hampshire, 403 U.S. 443, 470-471, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). This, however, would ignore the facts and realities of the situation. The suitcase was seized initially in California by Sergeant Figelsky of the Los Angeles Police Department. That seizure although done without warrant was legal, because

> Emery's legal inspection in effect put the marijuana in Figelsky's plain view; he, therefore, could seize the contraband upon sight. *Cf.* United States v. Riggs, 474 F.2d 699 (2d Cir. 1973), cert. denied, 414 U.S. 820, 94 S.Ct. 115, 38 L.Ed.2d 53 (1973). Figelsky made the seizure by removing one of the bricks of marijuana, marking all the rest of the bricks with his initials, and finally marking the suitcase itself with his initials. He then authorized the suitcase to be shipped on. Even though the suitcase was then in transit, later in the luggage bin, and later still in the freight room, it remained legally "seized" just as much as if it were under the actual physical control of the police. In fact, except for the time that it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car appellants were in, they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait. Accordingly, no warrant was required.

Id. at 450-51 [footnotes omitted]. See also *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973) ("events which later transpired did not constitute a separate or additional search"); *United States v. Emery*, 541 F.2d 887, 890 (1st Cir. 1976) ("inserting the beeper into . . . contraband . . . legitimately discovered and constructively seized at the border . . . did not violate" Fourth Amendment).

Where, as here, the suitcase with the contraband was never out of the sight of the DEA agents, the marking of the contraband, as done in *Ford* and *DeBerry*, where the contraband was shipped to different states, was not necessary to create the legitimate constructive seizure. In *Issod*, *supra*, it was not necessary to rely upon a constructive seizure because the second search was believed to have qualified as an automobile search governed by *Chambers v. Maroney*, 399 U.S. 42 (1970) and now changed as to that aspect by *Arkansas v. Sanders*,

supra. However, the remaining principles of *Issod* are not affected by *Sanders*.

The district court held that although the first private search wherein the presence of contraband was discovered was permissible and although there were reasons for not seeking a warrant until the defendant and her companion arrived at the airport at which time it was too late for a warrant, and although there was probable cause for the arrest and seizure, nevertheless the final search required a warrant. We hold that the first seizure followed by the controlled delivery created a constructive seizure which validated the second search.

IV

Inasmuch as the district court presumed without deciding that the earlier search made by airport personnel in the presence of the DEA agent was proper and that the earlier search provided the government with probable cause to believe that the suitcase contained contraband, we must consider and determine these questions.

The first search of the defendant's luggage was conducted by airport personnel prior to the DEA's involvement in any way. This search was a private search not protected by the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *United States v. Issod*, 508 F.2d 990, 994 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975).

Thereafter, the DEA agent arrived at the airport[9] and a second search was undertaken by airport personnel in

---

[9] When the DEA agent arrived at the airport, airport personnel showed him the smaller suitcase lying open on a desk. Resting on top of some women's clothing in the open suitcase was a plain unsealed manila envelope. The agent looked inside the envelope and saw seven clear plastic bags containing a white powdery substance, which, on the basis of his having seen cocaine hundreds of times, he concluded was cocaine. Tr. 11-13.

the agent's presence. The reopening and reinspection of the contents of a container by or in the presence of government authorities following a private search of the same container does not constitute a separate, independent search requiring a warrant. *United States v. Sanders*, 592 F.2d 788, 794 (5th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3258 (Oct. 16, 1979); *United States v. McDaniel*, 574 F.2d 1224, 1226-27 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 2181 (1979); *United States v. Pryba*, 502 F.2d 391, 401 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973).

The discovery of what an experienced narcotics agent concluded to be cocaine gave the DEA probable cause to arrest the defendant. The experienced agent testified that he had identified cocaine previously "hundreds of times" and that "[t]here was no question in my mind, I thought it was cocaine."

The judgment is reversed and remanded for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Sprecher
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

April 8, 1980.

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 79-2053 vs.

SANDRA BULGIER,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-185—JOEL M. FLAUM, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	79 CR 185
	)	
SANDRA BULGIER	)	

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter comes before the court upon defendant's Motion to Suppress. For the reasons set forth below, Government Exhibits 1 (Ex. 1) and 3 (Ex. 3) are ordered suppressed.

On March 16, 1979, defendant Sandra Bulgier (Bulgier) arrived at O'Hare International Airport in Chicago on a Continental Airlines (Continental) flight from Los Angeles, California. She was unable to locate her luggage, and so she filed a Delayed Baggage Report (Report) with Continental. Thereupon, Bulgier left the airport.

The next day, Continental employees located the missing luggage. After an unsuccessful attempt to have it delivered to the address listed in the Report, followed by an equally abortive effort to contact Bulgier at the phone number set forth therein, the employees opened one of the suitcases, Government Exhibit A (Ex. A), in the hope of finding some further means of contacting Bulgier. In so

doing, they were following what seems to have been Continental's normal operating procedure in such cases.

In the course of searching the bag for identification, the Continental employees found 90.83 grams of cocaine (Ex. 1) inside several clear plastic bags contained in a manilla envelope. When she arrived at work the next morning, Shava Judy Spector (Spector), was informed that the bag had been searched and that drugs were found in it. She then examined the plastic bags herself and, believing them to contain heroin, she called the DEA.

In response to her call, Special Agent Thomas L. Thompson (Thompson) contacted her. When appraised of the facts, Thompson went to meet Spector at the airport. Spector showed him the open suitcase, with the manilla envelope lying on top. Thompson removed the plastic bags therefrom and, upon visual inspection, concluded that they contained cocaine. Beyond noticing the fact that the open suitcase also contained some type of clothing, Thompson had no personal knowledge of what else was in Ex. A.

A search of Bulgier's other luggage followed. However, the facts surrounding that search are not relevant to the court's determination of the issue decided herein, and so nothing further shall be said concerning that search, except that nothing incriminating was found in the course of, or as a result of, it.

Subsequently, someone called Spector's office concerning Bulgier's luggage. When informed that it had been found, the caller stated that he would come and pick it up.

After listening, with Spector's consent, to that call, Thompson summoned Special Agent Michael Hillebrand (Hillebrand) to the scene. By the time Hillebrand arrived at Spector's office, Ex. A had been closed, with Ex. 1 inside. Until he had made the search held unconstitutional in this Opinion, he had no personal knowledge of what that suitcase contained. However, Thompson and Spector had told him what they knew about the case.

A few hours later, Bulgier and a male companion arrived and claimed the luggage. Bulgier signed for it, and picked up Ex. A. Her companion took the other two pieces of her baggage. They then took different escalators down to the lower level of the terminal. When Bulgier exited from the lower level and headed towards her companion's car, Hillebrand placed her under arrest and seized Ex. A.

From the time Bulgier informed the Continental employee working at the ticket counter that she was there to pick up her baggage until the moment of her arrest, she was under Hillebrand's continual surveillance. He observed that she did not open the suitcase during that time period.

Immediately after placing Bulgier under arrest, Hillebrand conducted a quick weapons search of her purse. He found none. Based upon the nature of Bulgier's clothing, he was satisfied that no pat-down of her person would be necessary. He did not feel it necessary to search Ex. A for weapons at that time, as he had seized it at the same instant that he arrested Bulgier.

Having concluded that Bulgier was unarmed and not dangerous, Hillebrand took her to the airport DEA office. Once there, he opened Ex. A and subjected it, along with her purse, to a thorough search. During this search, he found Ex. 1 and Ex. 3, a "coke spoon", in the suitcase, and another "coke spoon" (Government Exhibit 2) in her purse.

At the time of the search, the suitcase was concededly within the exclusive control of the DEA. Therefore, the question of the constitutionality of Hillebrand's warrantless search of Ex. A is clearly controlled by *United States* v. *Berry,* 560 F.2d 861 (7th Cir. 1977), *vacated on other grounds,* 571 F.2d 2 (7th Cir.), *cert. denied,* 99 S.Ct. 129 (1978), the Government's arguments notwithstanding.

The Government contends that *Berry* was incorrectly decided. This court disagrees, and it infers from *Arkansas* v. *Sanders,* 47 U.S.L.W. 4782 (U.S. June 20, 1979), that

the Supreme Court shares its view. In any event, this court is bound to follow *Berry* as long as it is the law of this Circuit.

Alternatively, the Government suggests that *Berry* is inapplicable here. The Government reasons that because Thompson had properly seen the packets and identified them as containing cocaine, the warrantless search violated no cognizable privacy interest of Bulgier.

The court rejects this view. Neither Thompson nor Hillebrand knew, on the basis of personal observation or otherwise, exactly what was in the suitcase. The discovery of Ex. 3, for instance, was unexpected. While it does not believe that its conclusion would necessarily be different if the Government had previously conducted a legal search of the suitcase and inventoried its entire contents, the court is satisfied that the total examination of the personal effects contained within Bulgier's suitcase that occurred in this case constituted a "search" within the meaning of the Fourth Amendment. Therefore, while the court has assumed, for the purposes of this ruling, that there was probable cause to believe the suitcase contained contraband, since there were no exigent circumstances, the court finds this warrantless search to have been "unreasonable" within the meaning of the Fourth Amendment.

Accordingly, Government Exhibits 1 and 3 must be suppressed.

It is so ordered.

/s/ Joel M. Flaum
United States District Judge

Dated: July 24, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	79 CR 185
	)	
SANDRA BULGIER	)	

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter comes before the court upon the Government's Motion for Reconsideration of its Order suppressing cocaine and a "coke spoon" seized by agents of the Drug Enforcement Administration (DEA) from defendant, Sandra Bulgier (Bulgier). For the reasons set forth below, the Motion is denied.

The facts relevant to the determination of this Motion are discussed at length in the court's Memorandum Opinion dated July 24, 1979, and so they will not be repeated here.

In that Opinion, this court ruled that *United States* v. *Berry,* 560 F.2d 861 (7th Cir. 1977) (*Berry I*), *vacated on other grounds,* 571 F.2d 2 (7th Cir.) (*Berry II*), *cert. denied,* 99 S.Ct. 129 (1978), was controlling precedent with regard to the issues involved in this case. The Government, in its briefs on the Motion *sub judice,* has merely renewed its earlier argument that *Berry II* deprived *Berry I* of its precedential value. The court, upon further consideration of this question, concludes that, while the Government may be correct insofar as it could be argued that, technically, *Berry II* reduced *Berry I* to *obiter dictum* or less, the Government's position is fundamentally wrong. *Berry II* showed no signs of retreating from the views espoused

by the unanimous panel in *Berry I*. To the contrary, the opinion in *Berry II*, when read fairly, reaffirms *Berry I's* teachings on the subject of substantive Fourth Amendment law. In vacating *Berry I*, *Berry II* reflects only the Seventh Circuit's concern, about applying the exclusionary rule to searches or seizures "retroactively" found to have been unconstitutional.

Even if this court were to consider *Berry II* as so far withdrawing from *Berry I* as to put this court in the position of deciding the questions raised and decided in *Berry I* as a matter of first impression in this Circuit, the result would be the same. As the court remarked in its Opinion of July 24, 1979, it believes *Berry I* to have been rightly decided. *United States* v. *Chadwick*, 433 U.S. 1 (1977), rejected the contention that a search like the one conducted in this case is a search of the person, whose validity is to be determined in accordance with the principles set forth in *United States* v. *Edwards*, 415 U.S. 800 (1974), and *United States* v. *Robinson*, 414 U.S. 218 (1973). And, as was pointed out by the Supreme Court in *Arkansas* v. *Sanders*, 99 S.Ct. 2586, 2593 n.11 (1979), this type of search cannot be justified as a search incident to arrest, since the suitcase was not within the arrestee's "immediate control" at the time of the search.

Considering *Berry I* to have been deprived of all precedential value, as well as wrongly decided, the Government presses upon the court its understanding of the proper legal analysis to be employed in this case. However, once again, the court is of the opinion that the Government misperceives some of the legal issues posed by this case and misconstrues the law applicable to the resolution of the others.

The Government begins by arguing briefly in favor of the constitutionality of the search of Bulgier's luggage conducted by several Continental Airlines employees, and the resultant viewing of the packets of cocaine by Special Agent Thomas L. Thompson (Thompson) of the DEA.

Since the court will assume, for the purposes of this decision, the existence of untainted probable cause to believe the suitcase contained contraband, which probable cause was sufficient to justify Bulgier's arrest, and that that arrest justified the warrantless seizure of her suitcase, it is not necessary for the court to address this portion of the Government's argument. The court will assume that Thompson could have seized the cocaine, and the entire suitcase in which it had been transported, before the suitcase was returned to Bulgier.

The Government next asserts that, by arranging for a "controlled delivery" of the suitcase to Bulgier, the DEA maintained "constructive possession" of the suitcase and its contents even while she exercised custody over it. No cases are cited by it in support of this proposition. The court has found two. In *United States* v. *Ford,* 525 F.2d 1308 (10th Cir. 1975), American Airline employees discovered that a package given to them contained contraband and showed it to California police officers. The officers field tested the suspect substance and found it to be heroin. Nonetheless, they allowed the package to be shipped by American to Oklahoma City. After she claimed the packages, Ford was arrested and the package was seized. Her objections were limited to the constitutionality of the California search and the warrantless seizure in Oklahoma. The Court of Appeals held that no seizure had taken place in Oklahoma. Rather, the court said that, under *United States* v. *DeBerry,* 487 F.2d 448 (2d Cir. 1973), the police seized the package in California and remained in constructive possession thereof until the time of its "repossession" by the law enforcement officers in Oklahoma. *DeBerry,* the other case that this court has discovered which is supportive of the Government's position, is factually quite similar to *Ford. DeBerry* relied on no prior case law. The *DeBerry* court merely reasoned that, because the contraband was under police control at the point of shipment, it was under their constructive possession even after it had been claimed by the person to whom the package had been sent.

While it may be true that the law enforcement officers' permission was a prerequisite to the airlines' shipment of the cargo transported in *Ford* and *DeBerry,* it does not necessarily follow that the arresting officers' actions did not constitute a second seizure of the contraband.[1] However, accepting *Ford* and *DeBerry* as good law, they do not legitimate the *search* of Bulgier's suitcase which is all that is at issue here.

Similarly, the Government's reliance on *United States* v. *Emery,* 541 F.2d 887 (1st Cir. 1976), is misplaced. *Emery* was concerned with the constitutionality of the Government's implanting a beeper within a package that had legally been inspected by its agents. Thus, *Emery* did not purport to consider the legality of the search conducted by DEA Agent Michael Hillebrand (Hillebrand) among the personal belongings contained in Bulgier's suitcase.

The Government then seems to suggest that *United States* v. *Issod,* 508 F.2d 990 (7th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975), and *United States* v. *Lamar,* 545 F.2d 488 (5th Cir. 1977), held that search constitutional. However, those cases do not lend any support to the Government's position. *Issod* does not consider the constitutionality of the search of the two trunks after their seizure by Government agents in Wisconsin. Indeed, the opinion of the court gives no indication as to when that search was conducted, and whether or not it was conducted pursuant to a warrant. To the extent that the opinion may have intended to suggest that a warrantless search of the trunks would have been permissible under *Chambers* v. *Maroney,* 399 U.S. 42 (1970), the law has since been changed by *Arkansas* v. *Sanders,* 99 S.Ct. 2586 (1979). As for *Lamar,* the quotation cited in the Government's brief is taken out of con-

---

[1] It is surely undeniable that the Government, by taking the suitcase from Bulgier upon arresting her, interferred with her possessory interest of it, although she may have been legally unable to enjoy a right of ownership over the cocaine contained therein.

text. Lamar's motion to suppress was premised on his contention that the airline employees' search was really a warrantless governmental search, hence violative of his Fourth Amendment rights. As in *Issod,* no mention is made by the *Lamar* court of the time of, or the conditions surrounding, any search of the seized bag that may have occurred after defendant Aaron's arrest. It appears that the remark quoted in the Government's brief was directed to the legality of Aaron's arrest—i.e., the court found the arrest to be valid because it was made on the basis of untainted probable cause. In any event, *Lamar* was also decided before *Chadwick* and *Sanders.*

The last case cited by the Government in support of its argument that the search was, at least in part, legal, *United States* v. *Haes,* 551 F.2d 767 (8th Cir. 1977), is also inapposite here. *Haes* held that a Government viewing of two allegedly pornographic films with the aid of a movie projector constituted a search separate from the one conducted by a private person who merely opened a package and found reels of film, labeled "Sex is My Bag" and "Flaming Youth", inside. In this case, the DEA agents were only privy to the result of the private search conducted by Continental employees. They knew something resembling cocaine was inside Bulgier's suitcase, but they knew nothing else about its contents except that it contained some clothing. *Haes,* if relevant at all to this case is surely not persuasive authority favoring the Government's position.

Ultimately, the Government's analysis of this case is that "Bulgier's protectable privacy interests had been extinguished by the time she took temporary custody of the suitcase before her arrest." More specifically, the Government claims that the Continental Airlines employee's discovery of the cocaine suspended her privacy interests, and that Thompson's viewing of the substance destroyed it entirely.

The court rejects the Government's analysis of the privacy interests involved in this case. While it is true that

Bulgier took the risk that the Continental Airlines employees might open her suitcase and turn over to the Government any contraband found therein, *cf. Hoffa* v. *United States,* 385 U.S. 293 (1966), this court agrees with the holding of *Haes* that "a defendant's expectation of privacy should not be deemed unreasonable merely . . . because of a right of [a freight carrier] to inspect packages," 551 F.2d at 770 (quoting *United States* v. *Kelly,* 529 F.2d 1365, 1370 (8th Cir. 1976), (brackets in *Haes*). Consistent with the result in *Haes,* this court concludes that the fact that the Government had lawfully obtained *some* knowledge about the contents of Bulgier's suitcase did not render unreasonable her expectation that no one would, without her consent, rummage through its contents in search of that known item. And this is precisely the privacy interest that was impermissibly invaded by the Government in this case.

As this court interprets the chain of events in this case, the DEA agents had, at the time of Bulgier's arrest, no more than (what is assumed to be untainted) probable cause to believe that her suitcase, contained contraband, among other things.[2] Since there were no exigent circumstances which would justify the Government's noncompliance with the Constitution's warrant requirement this finding should lead to the conclusion that Agent Hillebrand's

---

[2] The court does not regard this fact as determinative, but it is worth noting that the agents only had probable cause to believe that the substance contained in Bulgier's suitcase was contraband. In this sense, this case is no different from a case in which a trained police dog has sniffed a suitcase and indicated that drugs are contained therein. The identity of this case with the aforementioned hypothetical case becomes complete if it is assumed that the hypothetical traveller's suitcase had been packed by someone else. Yet the court doubts that the Government would seriously argue that the hypothetical traveller's suitcase could be opened without a warrant, absent exigent circumstances. The court simply cannot perceive any reason why the Motion in the case *sub judice* should have a different outcome.

warrantless search of Bulgier's suitcase was unconstitutional.

The Government would avoid this result by its argument that to require the authorities to obtain a warrant in this situation would be to elevate form over substance. However, this argument is fundamentally erroneous, in that it ignores the facts that the warrant requirement is the rule, and that the Government has the heavy burden of proving the necessity of specific exemptions from that rule. *See Arkansas* v. *Sanders,* 99 S.Ct. 2586, 2590-2591 (1979). No such necessity has been shown here. Although the search in this case may have been reasonable, "[t]he mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Id.* at 2590.

Accordingly, the Government's Motion to Reconsider is hereby denied.

It is so ordered.[3]

/s/ Joel M. Flaum
United States District Judge

Dated: September 5, 1979

---

[3] Subsequent to the writing of this opinion, *United States* v. *Garcia,* No. 78-1671 (7th Cir. Aug. 31, 1979), was decided. In that case a trial court's denial of a defendant's motion to suppress was affirmed by a divided panel, each of whose members contributed a separate opinion.

Garcia does not affect the result reached by the court in this case. This is so because of the critical respects in which the facts in the two cases differ.

In *Garcia,* the search of the defendant's hand-luggage occurred at the scene of her arrest, and within fifteen seconds on the an-

(footnote continued on following page)

---

[3] *Continued*

nouncement of that occurrence. Further, the luggage was within four to six feet of the defendant at the time the search was conducted. Finally, the defendant was apparently in no wise restrained, and the law enforcement officers had the right to take adequate precautions to insure their physical safety.

These factual considerations, which caused the majority in *Garcia* to uphold the trial court's decision that the warrantless search in that case was justifiable as a search incident to arrest under the principles enunciated in *Chimel* v. *California*, 395 U.S. 752 (1969), are lacking in the case *sub judice*. Bulgier's arrest took place just outside the lower level of the Continental Airlines terminal. Hillebrand immediately took her suitcase, which he carried as he escorted Bulgier to the DEA's Office, which is in another terminal. For the next five minutes, during which Hillebrand and Thompson continued to exercise "exclusive custody" over the luggage, Bulgier was "fingerprinted and processed". At last, her luggage was searched. While she seems to have been present during the search, no evidence has been presented regarding her proximity to the luggage or her freedom of movement at that time. In addition, the DEA agents have acknowledged the absence of exigent circumstances, as well as of their perception of such. Thus, the search in this case can not be considered as falling within the ambit of the *Chimel* doctrine, both because it was conducted at a time and place sufficiently remote from the arrest and because the element of necessity which inheres in the justification for the role of *Chimel* was strikingly absent in this case, on both a subjective and an objective level. This conclusion, in turn, renders *Garcia* inapposite.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

April 29, 1980.

Before
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 79-2053 vs.

SANDRA BULGIER,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-185—JOEL M. FLAUM, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellee, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the petition for rehearing is DENIED. An order will subsequently be entered ruling on the suggestion for rehearing *in banc.*

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

May 6, 1980.

Before
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. .....

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 79-2053 vs.

SANDRA BULGIER,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-185—JOEL M. FLAUM, *Judge.*

ORDER

An order has been entered on April 29, 1980 denying the petition for rehearing by all of the judges on the original panel, and no judge in active service has requested a vote on *in banc*. Accordingly,

IT IS ORDERED that the petition for rehearing *in banc* be, and the same is hereby, DENIED.